STATE OF MICHIGAN

COURT OF APPEALS

SHAQUALA PRICE, Conservator for OCKELEE DEMOND PERRY, Plaintiff-Appellant,	UNPUBLISHED March 27, 2007
v	No. 272808 Genesee Circuit Court LC No. 05-080587-NO
HEMPHILL ROAD PROPERTIES and HAROLD JONES PLUMBING & HEATING, Defendants-Appellees.	

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting summary disposition for defendants Hemphill Road Properties ("Hemphill") and Harold Jones Plumbing & Heating ("Jones P & H"), pursuant to MCR 2.116(C)(10). We affirm.

I

On August 14, 2003, plaintiff's three-year-old son, Ockelee Perry, suffered second- and third-degree burns when plaintiff's boyfriend, Marvin Williams, immersed him in a tub of hot water in plaintiff's apartment. Williams gave various conflicting statements to the police about the incident, and ultimately pleaded no contest to assault with intent to do great bodily harm less than murder. Nonetheless, a police report on the incident indicated that an officer tested the tap water in plaintiff's apartment several hours after the incident and found that it was 184°F.[1]

Plaintiff brought this action as Ockelee Perry's conservator against defendant Hemphill, the owner of the apartment complex, and defendant Jones P & H, the contractor who installed the building's boiler mates. Plaintiff alleged that defendants were negligent in allowing the water temperature to reach an unsafe temperature. Plaintiff theorized that the water became excessively hot because of a failure in the building's boiler and boiler mate system. The system, which Jones P & H installed in 1996, utilizes hot water from boilers to heat water in the boiler

[1] According to the American Burn Association, 100°F is considered the safe temperature for bathwater.

mates for use by residents. Plaintiff theorized that the zone valve failed, thereby permitting the water to heat to a temperature of 180°F, rather than the thermostat setting of 120°F, although plaintiff did not provide direct proof of a malfunction. Plaintiff further maintained that defendants should have installed a thermostatic mixing valve to serve as an anti-scalding safety device.

Hemphill moved for summary disposition under MCR 2.116(C)(10), arguing that it could not be held negligent because the boiler mate system fully complied with the Building Officials and Code Administrators ("BOCA") plumbing code when Jones P & H installed the boiler mates in 1996, and a thermostatic mixing valve was not required at that time. Hemphill also argued that there was insufficient proof that the bathtub water was 180°F. Hemphill argued that the police report was inadmissible, and there were no other complaints of excessively hot water in plaintiff's apartment building, and only one other complaint of hot water in another building. Further, Ockelee's injuries did not prove that the water exceeded 120°F, because his injuries were consistent with immersion in 120°F water for three minutes or less. It submitted documents from the American Burn Association, which stated that an adult will suffer serious burns if exposed to 120°F water for five minutes, and that children sustain burns after a shorter exposure. Hemphill also submitted the preliminary examination testimony of Ockelee's treating physician, Dr. James Wagner, who stated that the burns could have been caused by water that was 120°F to 150°F, depending on the length of exposure. Jones P & H filed a brief concurring with Hemphill's motion. The trial court granted summary disposition for defendants.

II

We review de novo a trial court's decision on a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). "Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law." *Id.* at 540. The trial court may consider only admissible evidence to determine whether there is a genuine issue of material fact. MCR 2.116(G)(6); *Veenstra, supra* at 163.

To prove her action for negligence against Jones P & H and Hemphill, plaintiff must establish these elements: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. *Taylor v Laban,* 241 Mich App 449, 452; 616 NW2d 229 (2000). After concluding that the police report was inadmissible to prove the temperature of the water, the trial court found that there was no evidence of an unsafe condition or a breach of duty. Plaintiff argues that the trial court erred in finding that there was no admissible evidence of an unsafe condition, i.e., the water was excessively hot.[2]

[2] To the extent plaintiff contends that the court may have subsequently changed its ruling to find merely that there was no "conclusive" evidence, we find that the record does not support this contention.

Plaintiff first argues that the trial court erred in finding that the police report was inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 333-334; 657 NW2d 759 (2002). Hearsay is not admissible except as provided by the rules of evidence. MRE 802; *Keywell & Rosenfeld*, *supra* at 333.

The police report, if offered to prove the temperature of the water, clearly qualifies as hearsay. Plaintiff argues that the report is admissible under the public records exception, of MRE 803(8), because it constitutes objective data observed and recorded by a police officer. MRE 803(8) provides:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, and subject to the limitations of MCL 257.624.

The police report is not admissible under MRE 803(8)(A), because this clause "is limited to 'records or reports' describing the general activities of an agency per se," and the report here relates to a single specific incident. *Solomon v Shuell*, 435 Mich 104, 130; 457 NW2d 669 (1990). Clause (B) is based on "the narrow common-law rule which limits public reports of matters observed by agency officials to reports of objective data observed and reported by these officials." *Bradbury v Ford Motor Co*, 419 Mich 550, 554; 358 NW2d 550 (1984). Plaintiff contends that a temperature reading taken in the course of the investigation of a crime or accident fits the narrow exception for objective data observed and reported. We disagree.

MRE 803(8)(B) does not provide a blanket exception for objective data reported by police officers or other public officials in the course of performing their duties. Rather, it applies only to "matters observed pursuant to duty imposed by law as to which matters there was a duty to report." Plaintiff's water temperature was not a matter that the police officers were charged to investigate and report. Rather, the temperature reading was incidental to the officers' general duty to gather information related to suspected criminal activity. Furthermore, plaintiff failed to establish that the officers' temperature reading was "objective data," *Bradbury*, *supra*. A temperature reading is objective only if the thermometer is properly calibrated and suitable for its purpose, and used according to a reliable procedure. Plaintiff failed to establish that these conditions were satisfied, and thus failed to establish a proper foundation for the report's admissibility.

Plaintiff argues that Ockelee's injuries prove that there was an unsafe condition even if the police report is inadmissible. We disagree. Plaintiff reasons that if the jury believes Williams's testimony that Ockelee was in the water for only two minutes, then the jury could conclude that the water must have been excessively hot. However, defendants presented evidence that his injuries were consistent with a child's short exposure to 120°F water. And plaintiff failed to present any evidence that Ockelee's burns were necessarily caused by exposure to temperatures above 120°F.

The trial court also properly determined that plaintiff did not establish a breach of duty where the boiler mate installation was in compliance with the applicable BOCA code. Plaintiff does not argue that the applicable BOCA code required defendants to install an anti-scalding device to prevent tap water from reaching an unsafe temperature. She argues, however, that code compliance does not necessarily negate a finding of negligence. Plaintiff relies on our Supreme Court's decision in *Schultz v Consumers Power Co*, 443 Mich 445; 506 NW2d 175 (1993), in which the plaintiff's decedent was electrocuted when his ladder came in proximity with a power line while painting a house. *Id.* at 447-448. The defendant argued, inter alia, that it was not negligent in its placement of the power line because it exceeded the clearance requirements published in the National Electric Safety Code (NESC). *Id.* at 455. The Supreme Court disagreed, stating:

> Compliance with the NESC or an industry-wide standard is not an absolute defense to a claim of negligence. While it may be evidence of due care, conformity with industry standards is not conclusive on the question of negligence where a reasonable person engaged in the industry would have taken additional precautions under the circumstances. *Owens v Allis-Chalmers Corp*, 414 Mich 413, 422-423; 326 NW2d 372 (1982); 2 Restatement Torts, 2d, § 295A, p 62. An argument on the basis of industry standards, therefore, goes to the question whether a defendant breached its duty of ordinary care, not whether a duty existed. If the plaintiff can convince a jury that a reasonably prudent company would have taken auxiliary measures beyond those required by industry standards, then the jury is clearly at liberty to find that the defendant breached its duty, regardless of the industry's guidelines. [*Schultz, supra* at 456.]

Schultz is distinguishable from the instant case, because the BOCA code,[3] unlike the electrical industry standards, has the force of law pursuant to this state's statutory and regulatory scheme. See MCL 125.1504; 1999 AC, R 408.30701. In *Gibson v Neelis*, 227 Mich App 187; 575 NW2d 313 (1997), the plaintiff brought a premises liability claim against the defendant, alleging that the defendant was liable for the decedent's death because the apartment building was not equipped with smoke detectors. This Court held that the plaintiff could not establish a breach of duty because the applicable BOCA code, as implemented by the State Construction Code Act, MCL 125.1501 *et seq*., did not require the installation of smoke detectors in the defendant's building at the time the fire took place. *Id.* at 191-192, 194. Similarly, in *Hasselbach v TG Canton, Inc*, 209 Mich App 475; 531 NW2d 715 (1994), the plaintiff alleged that her husband's shower water suddenly became excessively hot, causing him to suddenly back away from the shower stream and knock her down. This Court held that the trial court properly granted summary disposition for the defendants because the plaintiff failed to show that the applicable version of BOCA required a shower valve that was capable of limiting the water temperature to 110°F. *Id.* at 478-479. Accordingly, plaintiff cannot establish that defendants'

[3] Plaintiff does not dispute that the BOCA code was the applicable code at the time the work at issue was performed; Hemphill points out that the BOCA is now known as the International Code Council.

failure to install anti-scalding devices constituted a breach of a duty owed, because the applicable plumbing code did not require them.

Plaintiff also argues that the trial court erred in finding that there was no question of fact that Jones's installation work actually satisfied BOCA's code requirements. Plaintiff argues that evidence that the installation passed inspection does not necessarily prove that the code requirements were satisfied. This argument is ineffective, because a party opposing a motion for summary disposition under MCR 2.116(C)(10) bears the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). Defendants presented evidence that the installation work was determined to comply with code requirements, and plaintiff failed to offer any evidence establishing a question of fact with respect to this issue.

Finally, plaintiff argues that the trial court erred in finding that Hemphill did not have notice of the allegedly hazardous condition. The question of notice was not dispositive in this case. In light of our conclusions above, it is unnecessary to reach this issue.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra